STATE OF ALASKA (MOLLY TOCKTOO)

IBLA 89-151 Decided February 13, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing State protest and confirming approval of Native Allotment Application F-18558.

Set aside and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Generally

A protest by the State of Alaska against a Native allotment filed under sec. 905(a)(5)(B) of ANILCA will be considered sufficient to require the adjudication of the application pursuant to the Native Allotment Act where, as supplemented by information provided to BLM and the Board, it provides information showing that the allotment probably conflicts with an existing winter trail. A BLM decision denying the State's protest on the grounds that no trail exists that conflicts with the Native allotment will be set aside where the record reveals that such a trail does exist. On remand, BLM must adjudicate the allotment, under the provisions of the Native Allotment Act of 1906, considering whether the existence of the trial affects BLM's conclusions that her use was at least potentially exclusive.

APPEARANCES: Lance B. Nelson, Esq., Office of the Attorney General, State of Alaska, Anchorage Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The State of Alaska (the State) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated November 4, 1988, dismissing the State's protest against Molly Tocktoo's Native allotment application (F-18558) and confirming approval of her application.

On April 21, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application F-18558 on behalf of Tocktoo pursuant to section 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970) (the Native

Allotment Act). 1/ Tocktoo claimed use and occupancy of 160 acres of land since 1920, asserting seasonal use for fishing, berry picking, and camping, beginning June 1920. 2/

BLM conducted a field examination of four parcels, denominated Parcels A, B, C, and D, on August 23, 1975. This appeal concerns only Parcel C, consisting of 40 acres in protracted secs. 24 and 25, T. 12 N., R. 32 W., Kateel River Meridian, Alaska. 3/ In its field report dated December 8, 1975, BLM noted that the tract was located on the Seward Peninsula, on the eastern shore of the Chukchi Sea approximately 20 miles northeast of Shishmaref. According to the report, Tocktoo claimed use and occupancy of this parcel beginning in 1929, and the claimed use includes seal, walrus, and whale hunting and berry picking. BLM indicated that
the claimed improvement was a "very well used seal camp," and that Tocktoo comes to the area by boat in late summer and by dogteam or snowmachine in late winter and spring. BLM concluded that the applicant had used this allotment in accordance with the Native Allotment Act. The field report contains photographs and a contemporary inspection report documenting Tocktoo's qualifying use of Parcel C. The State has not challenged the validity of Tocktoo's qualifications for an allotment.

By letter dated February 18, 1976, BLM informed the applicant that
her Native allotment application had been approved for 160 acres (including Parcel C) and advised her that her allotment certificate would be issued after a survey of the lands had been approved and filed in the BLM office. Evidently, the survey has never been completed.

On June 1, 1981, the State filed its protest pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation
Act (ANILCA), 43 U.S.C. § 1634(a)(5)(B) (1988), which provides that legislative approval of a Native allotment application shall not occur if:

> (B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the

1/ The Native Allotment Act was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), on Dec. 18, 1971, subject to pending applications. The BLM decision stated the application was pending before the Department on Dec. 18, 1971, and the State has not challenged the timeliness of Tocktoo's application.

2/ This statement appears to have been erroneous, as the record elsewhere indicates that Tocktoo was not born until Dec. 23, 1925 (Remarks: Casefile Abstract, Nov. 4, 1988). The date of commencement of use was later stated to be 1929.

3/ The application incorrectly placed Parcel C in protracted Township 12 N., Range 31 W., which was inconsistent with the map accompany-ing the application and with information provided by the applicant during the August 1975 field examination.

> State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist.

The State's protest was a two-page form document, the first page of which stated that Tocktoo's allotment application identified land that was "necessary for access" as provided by the above-quoted section of ANILCA. On the same page, the State indicated by check marks that the land described in Tocktoo's application was used for an "existing trail," and that "no reasonable alternative for access exists because * * * [t]his is an existing constructed public access route, transportation facility or corridor." As discussed below, the State identified the trail as the "Candle Mail Trail," which is evidently not located anywhere near Parcel C.

In its decision, based on a review of the case file, topographic maps, field reports, and easements reserved pursuant to section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1988), BLM found that no trail crosses this allotment parcel. Therefore, BLM denied the protest. BLM also ruled that the allotment was legislatively approved as to Parcel C.

[1] The State's protest form included documentation describing a trail easement "[f]rom Norton Sound to Candle, 'Candle Mail Trail.'" A brief description of the trail reads as follows: "Nome-Council-Candle Trail-(altered to the route of present-use from Nome to Council). Follows recommended route from Council to Candle." The reason given for the protest was "[P]ublic Access for inter-village travel and travel to public Land." As for present use of the easement, the document specified "[m]ajor trail for winter travelers between Nome and Council. Minimal use of trail north of Council." No information was provided concerning access.

Parcel C lies hundreds of miles to the west of Council and Candle. No explanation of why the Candle Mail Trail would divert hundreds of miles through Shishmaref is evident from a review of the topography of the Seward Peninsula. It thus appears that the State's assertion that Parcel C affected the easement for the Candle Mail Trail was mistaken.

Despite the evident shortcomings in the State's initial protest, the Board has in the past upheld the efficacy of the minimal, conclusory form protest of the sort used by the State here. State of Alaska, 95 IBLA 196 (1987). Even where, as here, the State's protest form failed to provide detailed information relevant to the allotment, the efficacy of the protest has been upheld on appeal where it appears from the record that the protest specifies the basis of need for access across the land described in the allotment application. State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (1988); State of Alaska, supra. Thus, in determining whether the State has filed a protest sufficient under ANILCA to block legislative approval, it is appropriate to consider all information presently before us.

The record indicates that there is an existing access trail running through Shishmaref from Wales to Cape Espenberg. An easement recommendation that was evidently adopted by the Federal-State Land Use Planning Commission for Alaska in June 1979 in connection with review of the Shishmaref Village Selection Application (F-14934-A and -B) refers to Easement Identification Number (EIN) 1-D1, D9, C3, described as a "25-foot easement for an exist-ing access trail from Wales to Cape Espenberg via the Shishmaref Coast." (Emphasis supplied.) The recommendation notes that "[t]his is an existing winter trail heavily used by the public for intervillage travel and access to public land." Such trail would run in the vicinity of Parcel C, which is located on the Shishmaref Coast.

The presence of a trail in this vicinity is corroborated by a memorandum dated February 26, 1982, that appears to have been submitted by a State official to BLM in connection with consideration of reservation of easements for the Shishmaref Village selection (FF-14934-EE). The document depicts three winter trails meeting in Shishmaref. One of these trails is shown running to the northeast out of Shishmaref in the direction of Parcel C. The document states: "I would like to suggest that the three winter trails * * * be taken into account for easement purposes. Even though the major portion of all three trails is over ice, they all connect up with a small portion of land and are important for frequent winter travel." 4/

The State has provided on appeal a draft BLM memorandum listing easement recommendations for Shishmaref, including an easement numbered EIS 1 C3, D1, D9 for a trail between the village of Wales and Cape Espenberg, through the general area in which Parcel C is found. The memorandum comments:

> This trail is an important component of the Seward peninsula intervillage trail system. This trail is essential to provide for public travel between the village of Wales to the south and Cape Espenberg to the north. This trail provides access to public lands to the east and west. The trail is located on the beach above mean high tide. If ice conditions prevent use of this trail, alternate access can usually be gained by using the lagoon/inlet ice or the sea ice. An interview on November 14, 1979, at Shishmaref indicated that this trail is used yearly, ice conditions permitting. The Shishmaref Land Committee okayed this easement at their meeting of February 5, 1980.

(Exh. 4 at 5-6). If the easement is located on the beach as indicated in the draft memo, it appears certain that Parcel C is affected.

4/ The document shows the trail running only 6.5 miles to the northeast. As Parcel C lies some 20 miles to the northeast, this document does not by itself show that the trail traverses this parcel. Nevertheless, it is convincing proof that a trail ran out from Shishmaref to the northeast, and, as discussed below, other documents indicate that it ran past Parcel C to Cape Espenberg.

The record shows that the Interim Conveyance (IC No. 502) issued to Shishmaref Native Corp. on April 19, 1982, did reserve "EIN 1 C3, D1, D9," described as follows:

> An easement for an existing access trail twenty-five (25) feet in width from Wales in Sec. 6, T. 8 N., R. 37 W., Kateel River Meridian, following the coast northeasterly through Shishmaref to Cape Espenberg in Sec. 1, T. 11 N., R. 33 W., Kateel River Meridian. The uses allowed are those listed above for a twenty-five (25) foot wide trail. The season of use will be limited to winter.

The record also contains a memorandum dated April 5, 1985, by a State game biologist in Nome concerning Shishmaref coastal trails. This document describes an existing trail running out of Shishmaref through Parcel C, but describes relevant attributes of a winter trail in that area that complicate the question of where the trail is found. The document also summarizes the State's concerns regarding interruption of access:

> Attached is a map showing winter and summer access trails in the Shishmaref area. Let me emphasize that my first-hand knowledge of trail location is limited, and therefore illustrations or trail routes may not be exact. Someone intimately familiar with the area may draw a slightly different scheme.
> The areas outlined are actually access routes and technically speaking are not well defined trails that can be easily identified on the ground. Trails along the coast often follow the beachline near the high water mark and may not be readily apparent because of wind blown sand and tidal action. Winter "trails" along the coast usually parallel the beach but vary from year to year depending on snow and ice accumulation. Whether the trail is readily visible or not may be immaterial. The important point is that all these "trails" are often the only access routes along the coast and the Serpentine River. Persons who own private land across these routes could legally preclude travel, and such action could create access problems and hardships.

Finally, the record contains a letter dated December 5, 1988, showing that Tocktoo granted an easement for a 25-foot-wide permanent winter trail through Parcel C to Kawerak, Inc. 5/ Although the letter indicates that the location of the trail is still uncertain, it undeniably alludes to a winter trail. Tocktoo agreed in the letter to grant an easement (not including "overnight, viewsights, or stop over points") for "ingress and egress only" for "public users," and that, "if upon Survey this trail is found not to exist on [Parcel C] the easement becomes Null and Void."

5/ Kawerak, Inc., is described on its letterhead as "serving" villages on the Seward Peninsula, including Shishmaref. We presume that the easement was secured on behalf of Shishmaref Native Corp.

BLM points out that a winter trail is not a permanent, stationary feature located at a particular place, and that, in view of the topography of the area, travel would not be restricted to an established trail:

> There is really no reason why a trail * * * that generally goes along the coastline from one point to another has to cross any particular tract of coastal land. Rather, the trail can just as readily make a jog inland or out on State-owned tidelands if the geography makes such deviation convenient.

(BLM Answer at 7). However, BLM ignores that a 25-foot-wide easement has been preserved in lands conveyed to Shishmaref, Inc. Although the location of this easement has evidently not been identified, we have no reason to doubt that it will be. When it is located, it will probably cross Parcel C. Thus, it appears that the public's access to the trail might be impinged by the allotment.

In sum, despite BLM's protestations that there is no stationary, existing trail and that the granting of easement EIN 1 C3, D1, D9 does not signify that a trail exists, we regard the reservation of the easement as expressly confirming the existence of a winter trail running northeast out of Shishmaref through the vicinity of Parcel C to Cape Espenberg. Further, the facts that it was deemed appropriate to reserve an easement for this trail and that Shishmaref Native Corp. secured a conditional public easement across Parcel C from Tocktoo confirm that the trail is an important access route.

As BLM's decision rejecting the State's protest was based on the determination that there was no trail, it must be set aside as unsupported by the record. Having determined that a trail does exist and that it will likely be found to cross Parcel C, it follows that the State's protest was valid, as all that is required is for the State to identify the existence of a trail that would be threatened by an apparent conflict with the allotment. See State of Alaska (Elliot R. Lind) (On Reconsideration), supra at 15.

Two results appertain. First, Tocktoo's allotment was not legislatively approved. To the extent that BLM's decision states to the contrary, it is in error. Second, the validity of her allotment must be adjudicated under the Native Allotment Act. 43 U.S.C. § 1634(a)(5)(B) (1988); see State of Alaska (Elliot R. Lind) (On Reconsideration), supra; State of Alaska, 95 IBLA at 201; Eugene M. Witt, 90 IBLA 330, 336 n.4 (1986).

BLM has already adjudicated Tocktoo's allotment as to Parcel C and found it valid. However, BLM has not had the opportunity to evaluate the allotment application in light of the existence of the trail. We might expect BLM to evaluate whether the trail might be pre-existing use amounting to a conflicting interest that pre-dated Tocktoo's use of the parcel and, if so, whether this affects BLM's conclusion that her use was at least potentially exclusive. In view of BLM's mistaken rejection of the State's protest, we are unable to consider these issues at this time. Accordingly,

it is appropriate to remand the matter to BLM for further adjudication under the 1906 Act. 6/

We note that this matter may now be moot. The record shows that Tocktoo has already granted a permanent easement for a winter trail across Parcel C to the Native corporation. This grant (which is in the record)
is conditioned on the survey of the trail being found to exist on Parcel C and specifically addresses "ingress and egress" of "public users" across the parcel. Thus the right of access may already be guaranteed. Further, the State may also be able to gain a right of public passage across the parcel from Tocktoo, either directly or through the Bureau of Indian Affairs. See, e.g., State of Alaska Dep't of Transp. & Pub. Facilities, 116 IBLA 317 (1990).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further adjudication.

David L. Hughes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

6/ BLM, citing Frances Degnan v. Hodel, No. A87-252 Civil (Feb. 16, 1989), argues that BLM's Feb. 18, 1976, approval of Tocktoo's allotment application was final Departmental action that was not subject to review by the filing of the State's protest, and that the State is barred from challenging the granting of Parcel C at this point. However, we note that, in the report of remand in Clarence Lockwood (On Judicial Remand), IBLA 89-562, filed after its answer herein, BLM argued that Degnan should not be read to provide that the Department cannot take "corrective actions prior to final conveyance where such actions are necessary and appropriate." BLM did not rule that the State's protest against Tocktoo's allotment was barred by administrative finality. In view of the apparent uncertainty of BLM's posture on this question before the Board, we deem it appropriate to reserve ruling on the effect of Degnan until after BLM has had the opportunity to make an initial ruling on this point.